

December 23, 1991

The Honorable Warren Price, III
Attorney General
State of Hawaii
425 Queen Street
Honolulu, Hawaii 96813

Attention: Lawrence M. Reifurth
Deputy Attorney General

Dear Mr. Price:

Re: Workpapers Provided to the Consumer Advocate by Matson
Navigation Company

This is in reply to a memorandum dated December 4, 1991 from Lawrence M. Reifurth, Deputy Attorney General, to the Office of Information Practices ("OIP") requesting an advisory opinion concerning the above-referenced matter.

ISSUES PRESENTED

I. Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), workpapers provided to the Department of Commerce and Consumer Affairs' Division of Consumer Advocacy ("Consumer Advocate") by Matson Navigation Company ("Matson"), which support its filing for a general rate increase before the Federal Maritime Commission ("FMC"), are "government records."

II. Whether, under the UIPA, workpapers provided to the Consumer Advocate by Matson must be made available by the Consumer Advocate for inspection and copying "upon request by any person."

III. Whether a certification by the Consumer Advocate under 46 C.F.R. . 502.67(a)(3) (1990), that workpapers provided to it by Matson will not be disclosed to any person, conflicts with the Consumer Advocate's disclosure obligations under the UIPA.

BRIEF ANSWERS

I. Yes. Under the UIPA, the term "government record" means "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. . 92F-3 (Supp. 1991). Accordingly, we conclude that if Matson submits copies of its workpapers to the Consumer Advocate, they become government records, because the workpapers constitute information maintained by an agency in some physical form.

II. No. We conclude that under section 92F-13(3), Hawaii Revised Statutes, the Consumer Advocate is authorized to withhold public access to Matson's workpapers. The UIPA's legislative history indicates that among other records, "confidential commercial and financial information" may be withheld by an agency under the UIPA's exception for records that must remain confidential in order to avoid the frustration of a legitimate government function. Using case law under Exemption 4 of the federal Freedom of Information Act for guidance, and having thoroughly examined workpapers submitted to the FMC by Matson in the past, we conclude that the workpapers constitute "confidential commercial and financial information," the disclosure of which may result in the frustration of a legitimate government function.

III. Having concluded that the Consumer Advocate is not required by the UIPA to make copies of Matson's workpapers available for public inspection and copying, we need not examine whether a certification by the Consumer Advocate that it will not disclose the workpapers conflicts with its obligations under the UIPA.

FACTS

Under section 269-54(b)(7), Hawaii Revised Statutes, the Consumer Advocate represents the interests of consumers of utility services before any State or federal agency or instrumentality having jurisdiction over matters which affect those interests, including the FMC.

Recently, Matson filed a general rate increase with the FMC. Under FMC regulations, Matson was required to support its filing

of a general rate increase by the filing of sworn testimony, exhibits, and underlying "workpapers." See 46 C.F.R. . 502.67(a)(2) (1990). FMC regulations require Matson to provide copies of workpapers containing underlying financial and operating data that are filed in support of a general rate change to any person who requests them:

(3) Workpapers underlying financial and operating data filed in connection with proposed rate changes shall be made available promptly by the carrier to all persons requesting them for inspection and copying upon the submission of the following certification, under oath, to the carrier:

CERTIFICATION

I, (name and title if applicable) _____, of (Full name of company or entity), having been duly sworn, certify that the underlying workpapers requested from (Name of carrier), will be used solely in connection with protests related to and proceedings resulting from (Name of carrier) _____'s rate (increase) (decrease) scheduled to become effective (Date) _____ and that their contents will not be disclosed to any person who has not signed, under oath, a certification in the form prescribed, which has been filed with the Carrier, unless public disclosure is specifically authorized by order of the Commission or the presiding officer

46 C.F.R. . 502.67(a)(3) (1990).

On behalf of State consumers of utility services, the Consumer Advocate would like to consider filing a protest to the general rate increase filed by Matson, but it is concerned that entering into the certification, quoted above, will conflict with its disclosure obligations under the UIPA. Similarly, Matson has expressed reluctance to provide the Consumer Advocate with copies of workpapers containing financial and operating data that support its filing of a general rate increase, unless it receives assurances that the workpapers will not be publicly disclosed by the Consumer Advocate, except as provided by FMC regulations.

Accordingly, by letter dated December 4, 1991 to the Attorney General, Stephen T. Rudman, Matson's Assistant General Counsel, requested an opinion from the Attorney General concerning whether workpapers provided to the Consumer Advocate are "government records" under the UIPA, and whether the UIPA's disclosure provisions supersede a written certification by the Consumer Advocate that Matson's workpapers will not be disclosed to any other person. In accordance with established protocol, the Attorney General forwarded Matson's request for an opinion to the OIP for a reply.

Additionally, by memorandum dated December 4, 1991, Lawrence M. Reifurth, Deputy Attorney General, requested an advisory opinion from the OIP concerning whether, under the UIPA, Matson's workpapers, when in possession of the Consumer Advocate, are protected from public disclosure under the UIPA's statutory exceptions to required agency disclosure.

In connection with our preparation of this opinion, Matson voluntarily provided, for the OIP's examination, copies of workpapers filed by Matson with the FMC in support of past general rate increase filings.

DISCUSSION

I. INTRODUCTION

Under part II of the UIPA, each agency must make government records available for public inspection and copying unless one of the exceptions set forth in section 92F-13, Hawaii Revised Statutes, permits the agency to withhold access to those records. See Haw. Rev. Stat. . 92F-11(b) (Supp. 1991). Under the UIPA, the term "government record" means:

[I]nformation maintained by an agency in written, auditory, visual, electronic, or other physical form.

Haw. Rev. Stat. . 92F-3 (Supp. 1991).

In OIP Opinion Letter No. 91-5 (April 15, 1991), we noted that the Legislature did not define the meaning of the word "maintain" for purposes of the UIPA. As such, we consulted the definition section of the Uniform Information Practices Code ("Model Code") drafted by the National Conference of

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Commissioners on Uniform State Laws, and upon which the UIPA was modeled, for guidance in determining the meaning of the word "maintain." In that opinion we noted that the Model Code defines the term "maintain" as to "hold, possess, preserve, retain, store or administratively control." See OIP Op. Ltr. No. 91-5 at 6. Additionally, we noted the Model Code commentary indicated that the term was intended to be comprehensive:

"Maintain" is defined in Section 1-105(6) to sweep as broadly as possible. It includes information possessed or controlled in any way by an agency. The administrative control component of the definition is especially important since it prevents an agency that does not have physical custody of the government records from evading its obligations under this code.

Model Code . 1-105 commentary at 9 (1980).

Once obtained by the Consumer Advocate, we conclude that Matson's workpapers constitute "government records" under the UIPA since they constitute information held, possessed, retained, or stored by an agency in some physical form. However, even if we were to use the more restrictive definition of the term "agency record" under the Freedom of Information Act, 5 U.S.C. . 552 (1988) ("FOIA"), we would reach the same result. In Dep't of Justice v. Tax Analysts, 492 U.S. 136 (1989), the U.S. Supreme Court held that a document is an "agency record" under the FOIA if it is either "created or obtained" by an agency, and in the agency's possession at the time of a FOIA request. Tax Analysts, 492 U.S. at 144-45. Thus, generally, "materials obtained from private parties and in the possession of a federal agency [are] agency 'records' within the meaning of FOIA." Weisberg v. Dep't of Justice, 631 F.2d 824, 827-28 (D.C. Cir. 1980). Accordingly, we conclude that once submitted to the Consumer Advocate, Matson's workpapers constitute government records under the UIPA.

Having determined that Matson's workpapers constitute government records when copies of those workpapers are in the possession of the Consumer Advocate, we shall now determine whether the workpapers are protected from required agency disclosure by one of the exceptions set forth at section 92F-13, Hawaii Revised Statutes.

II. DISCLOSURE OF MATSON WORKPAPERS TO THE PUBLIC

Under section 92F-13(3), Hawaii Revised Statutes, an agency is not required to make available for public inspection and copying "[g]overnment records that, by their nature, must be confidential in order to avoid the frustration of a legitimate government function." Haw. Rev. Stat. . 92F-13(3) (Supp. 1991).

In Senate Standing Committee Report No. 2580, dated March 31, 1988, the Legislature provided examples of government records that could be withheld under this UIPA exception if disclosure would result in the frustration of a legitimate government function, including:

(b) Frustration of a legitimate government function. The following are examples of records which need not be disclosed, if disclosure would frustrate a legitimate government function.

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(7) Trade secrets or confidential commercial and financial information;

S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988) (emphasis in original).

In determining whether information submitted to a government agency is confidential commercial and financial information, the OIP has resorted to case law interpreting and applying FOIA's Exemption 4, which permits federal agencies to withhold access to "trade secrets and commercial and financial information obtained from a person and privileged or confidential." See OIP Op. Ltr. Nos. 89-5 at 14-19 (Nov. 20, 1989), 90-3 (Jan. 18, 1990).

As set forth in previous OIP advisory opinions, the federal courts have found that commercial and financial information is "confidential" if its disclosure would likely: (1) impair the Government's ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974) ("National Parks").

In filing a general rate increase with the FMC, Matson is required to provide detailed exhibits, testimony, and workpapers that contain extremely detailed information concerning its operations. In particular, Matson must file a company-wide balance sheet and income statement, actual and projected rate of return exhibits, detailed investment and depreciation information, a working capital schedule, an inventory of property and equipment, a detailed listing of general and administrative expenses, as well as other similar schedules. See 46 C.F.R. Part 552 (1990). Having thoroughly examined workpapers submitted to the FMC by Matson in the past that contain the above information, we conclude that disclosure of the workpapers would likely result in substantial competitive harm under the National Parks test. See National Parks and Conservation Ass'n v. Kleppe, 547 F.2d 672 at 676 n.9 (D.C. Cir. 1976).

Finally, under the UIPA, agencies are not required to disclose government records protected from disclosure by State or federal law. See Haw. Rev. Stat. . 92F-13(4) (Supp. 1991). However, having concluded that the Consumer Advocate is authorized to withhold access to Matson's workpapers under section 92F-13(3), Hawaii Revised Statutes, we need not reach a conclusion concerning whether 46 C.F.R. . 502.67(a)(3) (1990) is a federal law which prohibits the disclosure of government records.

III. WHETHER CERTIFICATION OF CONFIDENTIALITY CONFLICTS WITH THE UIPA

In previous OIP opinion letters, we have opined that an agency may not, through promises or by contract, avoid its disclosure obligations under the UIPA. In these opinion letters, we examined case law from other jurisdictions in which such confidentiality provisions have been held to be a nullity in the face of state public records laws. See OIP Op. Ltr. Nos. 90-2 (Jan. 18, 1990), 90-39 at 10 (Dec. 31, 1990). As stated by a recent court decision under the Florida Public Records Act, "[a]n agency simply cannot bargain away its Public Records Act duties with promises of confidentiality." The Tribune Co. v. Hardee Memorial Hospital, 19 Media L. Rep. 1318 (1991 WL 235921) (Fla. Cir. Ct. Aug. 26, 1991).

However, having concluded that the Consumer Advocate is authorized to withhold access to Matson's workpapers under section 92F-13(3), Hawaii Revised Statutes, it is unnecessary for us to examine whether the certification described by 46

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C.F.R. . 502.67 (1990) conflicts with the Consumer Advocate's obligations under the UIPA.

CONCLUSION

We conclude that workpapers prepared by Matson in connection with a general rate increase filing with the Federal Maritime Commission are government records under the UIPA, when copies of those workpapers are provided to and possessed by the Consumer Advocate.

Additionally, after having thoroughly examined the contents of workpapers submitted to the FMC by Matson in the past, we conclude that under section 92F-13(3), Hawaii Revised Statutes, the Consumer Advocate is not required to make Matson's workpapers available for public inspection and copying. Specifically, we conclude that the workpapers contain commercial and financial information that must remain confidential in order to avoid the frustration of a legitimate government function.

Finally, because we conclude that Matson's workpapers are protected from required agency disclosure under the UIPA, we need not examine whether a promise by the Consumer Advocate not to disclose Matson's workpapers conflicts with the Consumer Advocate's obligations under the UIPA.

Very truly yours,

Hugh R. Jones
Staff Attorney

APPROVED:

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